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In the

Supreme Court of the United States

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION
Petitioner,

v.

RALPH P. FORBES
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, VERMONT AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

DANIEL E. LUNGREN
Attorney General of California
RODERICK E. WALSTON
Chief Assistant Attorney General
CHARLES W. GETZ, IV
Assistant Attorney General
* EDNA WALZ
Deputy Attorney General
1300 "I" Street
Suite 125
Sacramento, CA 95914
(916) 324-5366

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First Street, N.E., Suite 1100
Washington, D.C. 20002

* *Counsel of Record*
[additional counsel listed on inside cover]

20 pp

WILLIAM H. PRYOR JR.
Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36160

GRANT WOODS
Attorney General
State of Arizona
1275 West Washington
Phoenix, AZ 85007-2926

GALE A. NORTON
Attorney General
State of Colorado
Department of Law
1525 Sherman Street
Denver, CO 80203

ROBERT A. BUTTERWORTH
Attorney General
State of Florida
The Capitol
PL 01
Tallahassee, FL 32399-1050

MICHAEL J. BOWERS
Attorney General
State of Georgia
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

ALAN G. LANCE
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83270-0010

CARLA J. STOVALL
Attorney General
State of Kansas
Judicial Building
301 West Tenth Street
Topeka, KS 66612-1597

RICHARD P. IEYOUB
Attorney General
State of Louisiana
Department of Justice
P.O. Box 94095
Baton Rouge, LA 70804-4095

MIKE MOORE
Attorney General
State of Mississippi
Department of Justice
P.O. Box 220
Jackson, MS 39205-0220

JOSEPH P. MAZUREK
Attorney General
State of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
Old Supreme Court Building
198 South Carson
Carson City, NV 89710

PHILIP T. MCLAUGHLIN
Attorney General
State of New Hampshire
33 Capitol Street
Concord, NH 03301

MICHAEL F. EASLEY
Attorney General
State of North Carolina
P.O. Box 629
Raleigh, NC 27602-0629

BETTY D. MONTGOMERY
Attorney General
State of Ohio
State Office Tower
30 East Broad Street
Columbus, OH 43266-0410

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105-4894

HARDY MYERS
Attorney General
State of Oregon
Justice Building
1162 Court Street NE
Salem, OR 97310

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001

WILLIAM U. HILL
Attorney General
State of Wyoming
State Capitol Building
Cheyenne, WY 82002

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. WHERE GOVERNMENT UTILIZES OUTSIDE SPEAKERS TO HELP PRESENT A PUBLIC BROADCAST PROGRAM, IT IS ITSELF SPEAKING AND NOT OPENING A FORUM 3

1. "Forum" Analysis Does Not Apply Where The Government Itself Is The Speaker, As The Government Is When It Broadcasts Programs On Public Television Stations 4

2. The Government, Like The Editor Or Manager Of Any Publication Or Broadcast, Remains The Speaker Even Where It Invites Contributions From Third Parties 7

B. SUBJECTING GOVERNMENT-AUTHORED PROGRAMS TO FORUM ANALYSIS WOULD SERIOUSLY CRIPPLE MUCH GOVERNMENT SPEECH 9

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788 (1985) 3-7, 9

Chandler v. Georgia Public Telecommunications Commission, 917 F.2d 486 (11th Cir. 1990) 3, 4

Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) 5

FCC v. League of Women Voters of California, 468 U.S. 364 (1983) 1, 6, 10

Greer v. Spock, 424 U.S. 828 (1975) 9

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338 (1995) 5, 8

Lamb's Chapel v. Center Moriches School District, 508 U.S. 385 (1993) 7

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 3-6

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 10

Rosenberger v. Rector & Visitors of Univ. of Virginia, 115 S. Ct. 2510 (1995) 5-7

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 7, 8

United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 111 (1981) 4

Widmar v. Vincent, 454 U.S. 263 (1981) 7

MISCELLANEOUS:

T. Emerson, *The System of Freedom of Expression* (1970) 5

The Smithsonian Associate, April, 1997 12

The 19 amici curiae states, through their undersigned attorneys general, respectfully submit this brief in support of petitioner.

INTEREST OF THE AMICI CURIAE

State and local government agencies have historically been the licensees for at least two-thirds of the public television stations (*FCC v. League of Women Voters of California*, 468 U.S. 364, 393 n.22 (1983)) as well as many public radio stations. This case arises from a debate staged by the Arkansas Educational Television Network (AETN) featuring the two leading candidates for a congressional seat. The decision below essentially holds that whenever such a station, as part of its programing, gives the microphone to an outside speaker, it is creating a "public forum" for the benefit of some class of persons, so that other members of the identified class have the right to appear and speak as part of the program.

Such a rule would seriously affect public television and radio broadcasting stations' ability to fulfill their mission of providing the public with "suitable access to social, political, esthetic, moral, and other ideas and experiences through the medium of broadcasting." *League of Women Voters*, 468 U.S. at 377 (internal markings and citations omitted). Moreover, the *amici*'s interest is broader than the ambit of public radio and television broadcasting. The principle adopted by the Eighth Circuit would extend to programs put on by universities and other state and local entities when they invite outside speakers to participate in programs they are presenting, when they publish edited collections of materials from outside contributors, and even when they mount exhibits using works by outside artists.

SUMMARY OF ARGUMENT

A. When a government selects speakers for public television programing, it is, for purposes of First Amendment analysis, in the role of "speaker." It is not merely providing a "forum" for the benefit of the speakers, but is selecting them and their contributions as part of the presentation which it is authoring. This posture is unlike the posture in which a "public" vs. "nonpublic" forum analysis is appropriate, *i.e.*, where the government is in the essentially passive role of permitting access to government property for private communicative purposes. As the speaker, the government and its agents are entitled to control the content of their own message. A private person, such as a candidate wanting to participate uninvited in a programmed debate, does not have a constitutional right to alter the message.

B. Applying "forum" analysis to public broadcasting stations' programing would cripple their efforts to provide suitable access to a range of programing and experiences. Even if a particular program were deemed to create a "nonpublic" rather than a "public" forum, the stations would be required to make "viewpoint-neutral" decisions regarding speaker access. This would inhibit the entity's ability to target and meet the programing needs of the audience. The requirement to be viewpoint neutral would eviscerate the editorial function and provide a temptation for abuse by persons who want to take advantage of the audience attracted to a different speaker. Moreover, the same inability to control program content would extend to universities, museums, bar education committees and other public entities with an educational function when they utilize invited speakers or other outside contributors.

ARGUMENT

A. WHERE GOVERNMENT UTILIZES OUTSIDE SPEAKERS TO HELP PRESENT A PUBLIC BROADCAST PROGRAM, IT IS ITSELF SPEAKING AND NOT OPENING A FORUM

The Court has been asked to review a conflict between the Eighth Circuit decision below and the Eleventh Circuit decision in *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990) regarding whether, in staging a debate between selected candidates for a particular political office, a governmentally-owned public television station creates a limited "public forum." The object of such analysis is to determine what standards the government can apply when it regulates access to the forum. If it is found that the government has intentionally created a public forum, even one limited to a certain subject matter or certain groups, it must have compelling reasons to exclude anyone unless they do not meet the pre-established criteria. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 55 (1983). If, on the other hand, the "forum is determined to be nonpublic, the state may restrict access to the forum . . . as long as the decision is reasonable and is viewpoint-neutral." *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985).

The Eighth Circuit characterized the debate program as a "forum" and held that by staging it the station opened a limited public forum for the benefit of a class consisting of the candidates for the particular office. Accordingly, the station could not exclude other candidates such as Mr. Forbes. Pet. App. 14a-15a. In *Chandler*, on the other hand, the Eleventh

Circuit focused on the "activity" of presenting a program. It held that the state could control the program's content, as by excluding the third candidate, in order to achieve the purpose of the activity. 917 F.2d at 488. *Amici* argue here that the Eighth Circuit erred in even applying a forum analysis at all to the facts of this case. In making programing decisions, the station itself was, in essence, speaking. It was not providing a forum for the benefit of private speakers. In its role as speaker, rather than mere forum provider, the state actor is not restricted by speaker-inclusive and viewpoint-neutral rules.

1. "Forum" Analysis Does Not Apply Where The Government Itself Is The Speaker, As The Government Is When It Broadcasts Programs On Public Television Stations

Forum analysis addresses the right of access, for private communicative purposes, to government property. As summarized in *Cornelius*, 473 U.S. at 800, "the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its *property* to its intended purpose outweighs the interest of those wishing to use the *property* for other purposes." (Emphasis added.) It starts with the premise that "'[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Perry Educ. Ass'n*, 460 U.S. at 46 (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 111, 129-130 (1981)). The concept originally applied to "property" in the sense of real property. The concept has been broadened beyond real estate to include use of channels of communication operated by government, *e.g.*, an internal

school mail system (*Perry*), charitable fund raising-campaigns conducted among federal employees (*Cornelius*), and even subsidies for student publications. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2517 (1995) ("a forum more in a metaphysical than in a spatial or geographic sense").

Where, on the other hand, the government itself is speaking or subsidizing transmittal of a message for its own programmatic purposes, the message conveyed is not a "forum" to which private individuals might expect any right to access. Just as a private speaker using a public forum has a First Amendment right to control its own message (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995)), the government, although not protected by the First Amendment, is permitted to "control[] its own expression or that of its agents." *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (quoting T. Emerson, *The System of Freedom of Expression* 700 (1970)). When a government-owned public television station chooses the content of its programing, the station is the speaker, just as "[w]hen the University determines the content of the education it provides, it is the university speaking." *Rosenberger*, 115 S. Ct. at 2517. Government may fully "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.*

The debate format here was used with a different intention from that which is associated with the opening of a forum. The intended beneficiary of public television programing is the viewing audience, not the candidates. Public television's

mission is to provide the viewing public with "suitable access to social, political, esthetic, moral, and other ideas and experiences through the medium of broadcasting." *League of Women Voters,* 468 U.S. at 377 (internal markings and citations omitted). To be sure, the candidates who participated in the televised debate were undoubtedly incidental beneficiaries by virtue of the public exposure, just as a working sculptor would be incidentally benefitted by a program in which the artist were interviewed and the artist's works were shown. Similarly, a guest lecturer at a university or the author of a textbook selected for a class would be incidentally benefitted by the exposure and, in the latter case, by royalties. Nevertheless, the entity choosing the programing or curriculum is the editor and is entitled to exercise editorial discretion. Here, government, through petitioner, was speaking by delegation to AETN's executive director, its editor-in-chief. J.A. 108.

By contrast, the government's role as forum provider is different. When, for example, it opens a "public forum," it "does not itself speak or subsidize transmittal of a message it favors but instead . . . encourage[s] a diversity of views from private speakers." *Rosenberger,* 115 S. Ct. at 2519 (1995). The question of whether a forum is public or nonpublic arises when governmental resources are made available to serve the communicative needs of the private speakers, such as the fund raising in *Cornelius*. It is on the initiative of the speaker rather than the government that a private speaker uses government resources to send his own message. In *Perry,* for example, the school mail facilities were "generally *open for use* by the Girl Scouts, the local boys' club, and other organizations." 460 U.S. at 48 (emphasis added). Generally speaking, the private speaker's use is on a self-demand

schedule, with the speaker using the forum whenever the need or desire arises. The forum may be open only periodically, as the fund-raising drive in *Cornelius*. The venue, such as the community theater in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), may also, of course, be booked for other events. Within such constraints, however, the private speaker schedules the use. Thus, in *Lamb's Chapel v. Center Moriches School District,* 508 U.S. 385 (1993), a religious group tried to schedule use of school facilities for the purpose of presenting a film series; in *Widmar v. Vincent*, 454 U.S. 263 (1981), the student group wanted to schedule its own meeting using university facilities. Government's role is just to provide the venue.

2. The Government, Like The Editor Or Manager Of Any Publication Or Broadcast, Remains The Speaker Even Where It Invites Contributions From Third Parties

In this case, the station's status as speaker rather than forum provider was apparently clouded by the fact that the programing at issue turned over the microphone to the candidates. However, the government affirmatively invited the particular candidates and organized the debate in order to inform its audience about the newsworthy subject of the congressional elections and the leading candidates' positions and personas. The station could have presented the topic by having one of its reporters prepare and present a summary. It chose instead to "enlist[] private people to convey its own message." *Rosenberger*, 115 S. Ct. at 2518. Although each of the candidates was undoubtedly seeking to convey the message "vote for me," the station's message was "these people are newsworthy, and this is how they present

themselves and what the have to say." This is the same basic message that a university conveys when it includes in its curriculum a study of Socrates and Plato, namely, that they are academically noteworthy, this is their background and what they had to say.

As the Court pointed out in *Hurley*, the status of "speaker" for First Amendment analysis does not require that the person "generate, as an original matter, each item featured in the communication." 115 S. Ct. at 2345. The role is not forfeited by "combining multifarious voices, or by failing to edit their themes to isolate an exact message." *Id.* Indeed, "the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages," and in publishing them, the newspaper receives the First Amendment protection afforded a "speaker." *Id.* at 2346. The message becomes the editor's own creation when, "[r]ather like a composer," she "selects the expressive units of the [program] from potential participants" to create a particular presentation with her own stamp. *Id.* at 2348.

Thus, even if a governmentally-owned public radio station were to host a talk show, inviting listeners to have the chance to be heard over the air by picking up their telephone, no forum would be created as long as the station maintained editorial control. By contrast, if programing slots were created expressly for the purpose of enabling community groups to air programs of their choice without editorial intervention, this would create a public forum, much like a government-owned theater. *Southeastern Promotions,* 420 U.S. 546.

The pivotal issue is whether the governmental entity affirmatively chooses material as a means of carrying out its own program. The Court noted in *Greer v. Spock*, 424 U.S. 828, 838 n.19 (1975), that "the fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum." *Amici* submit further that utilizing outside speakers to serve a governmental programmatic purpose does not convert the program into something other than government speech.

B. SUBJECTING GOVERNMENT-AUTHORED PROGRAMS TO FORUM ANALYSIS WOULD SERIOUSLY CRIPPLE MUCH GOVERNMENT SPEECH

If programing produced by government-owned entities had to be submitted to a forum analysis it would seriously hamper such programs regardless of the outcome. Even were the forum deemed nonpublic rather than public, decisions to exclude uninvited and unwanted participants would have to be governed by viewpoint neutrality. *Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum [must be] viewpoint-neutral."). This would mean, as a very obvious example, that a program could not focus on persons deemed newsworthy by the very fact that they represent an unusual viewpoint. Because, under the Eight Circuit analysis, a single program constitutes a separate forum unto itself, the viewpoint neutrality must be reflected in the editorial decisions made within that self-contained forum. It would not be enough that programing were viewpoint-neutral over a particular period, say, a year.

Moreover, on most subjects, and particularly such subjects as how to educate a child or maintain world peace, there are an infinite variety of viewpoints, all of which could not possibly be accommodated within a single program. Viewpoints would either have to be selected by some random process or the producer would have to aim at the probably impossible goal of presenting no viewpoint at all. To the objection that in this case AETN would only have had to add one more candidate to the debate, so that the disruptive effects would have been minor, *amici* respond that once the principle is established, the ramifications are extremely burdensome.

As can be readily appreciated, presenting material with random or no viewpoint would be clearly antithetical to achieving public broadcasting's mission to provide its viewing audience with "suitable access to social, political, esthetic, moral, and other ideas and experiences through the medium of broadcasting." *League of Women Voters*, 468 U.S. at 377. Without a coherent viewpoint there is no "suitable access." Compared to an edited presentation, an unedited collection of personal viewpoints can be rather like white noise: all the frequencies are there, but not in any intelligible form and not tailored to the needs of the listener. Under the public interest standard that governs all television broadcast licensees, the licensees are required to make the inherently subjective determination that their programming decisions are responsive to the needs, problems, and interests of the residents of the area they serve. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969). Clearly, if public television stations are to do their job to target the interests and needs of their audiences, they must be able to edit out those who want to impose their own content on the programming.

Another practical problem is determining how many outside speakers it takes to make a forum. What if a single outside person is invited to be interviewed on a televised program? Even the appearance of that sole person, if he is expected to express an assortment of views on a multiplicity of topics, could saddle the station with knotty issues of defining viewpoint neutrality. Likewise, would a school inviting in a speaker to talk about the dangers of alcohol and drug use also have to invite a speaker who presented an opposing view?

The risk of uninvited persons demanding to intrude on programing is not trivial. By hijacking part of a program that had been planned to showcase another speaker the intruder is also hijacking the other speaker's audience and gaining prestige by being associated with noteworthy persons. In this case, for example, Mr. Forbes did not request equal time under statutory equal access provisions. Had he done so, he would probably not have had a large viewing audience, for he admitted that his campaign had not garnered much interest. J.A. 95-97. Had he been permitted to join the debate, however, he would have had access not only to the channel of communication, *i.e.*, the broadcast facilities, but also to the audience that was drawn by the other candidates in whom the public *was* interested. Because of the added incentive of the audience and association with noteworthy persons, it is realistic to fear a clamoring for access.

Moreover, if the principle were established that using outside speakers in programs creates a forum, it would apply not only to broadcasting but to all other governmental activities that have an educational or informational mission. For example, the Smithsonian Institute, a government agency, regularly puts on lecture series. One of many recent such

series had as its subject the reversion of Hong Kong to China. *The Smithsonian Associate*, April, 1997, p.62. As is typical, lectures for this series were given by outside speakers. Applying the principle that utilizing outside speakers creates a forum, the Smithsonian Institute's ability to put on such lecture series would be infected with the same problems described above. What range of viewpoints on Hong Kong's reversion would have to be accommodated in order to be viewpoint neutral?

Other examples abound. A university press publishes a book consisting of papers written by outside scholars; a museum curator assembles an exhibit of art works created by various artists; a continuing education program is put on by the state's bar association relying on private practitioners to make presentations; a historic park invites persons competent in historical crafts to demonstrate their skills and talk to visitors about what life was like during the time period illustrated. In each instance, a requirement of viewpoint neutrality would wreak havoc.

The viewpoint neutrality requirement does not cause these types of practical problems in managing true government-created fora (be they public or nonpublic) in respect to private communications. As discussed in Section A, *supra*, it is the private individual seeking to use the forum who crafts the message for his own purposes. The message does not represent the government or seek to achieve governmental goals. It is strictly the message of the private party. Thus, government can be quite disinterested in the viewpoint and need not inquire into it. Omitting inquiry into viewpoint lessens rather than increases the transactional burden.

In conclusion, a considerable range of government-sponsored educational and informational programs would be seriously impoverished if the forum doctrine were to apply every time outside speakers or contributors were utilized. Such programs would be impoverished either by content neutrality, or, more likely, by abandonment of the practice of using such speakers because of the attendant problems. Public television would thereby lose the views of person with special expertise, occupying special positions, or having interesting viewpoints.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California
RODERICK E. WALSTON
Chief Assistant Attorney General
CHARLES W. GETZ, IV
Assistant Attorney General
* EDNA WALZ
Deputy Attorney General
1300 "I" Street
Suite 125
Sacramento, CA 95814
(916) 324-5366
Counsel for *Amici* States

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First Street, N.E.
Suite 1100
Washington, D.C. 20002

* *Counsel of Record*

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